

## THE SIX NATIONS: A NEGLECTED ASPECT OF CANADIAN LEGAL HISTORY

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### ABSTRACT/RESUME

The author outlines the history of the legal relationship between the Six Nations Indian Band and government, drawing extensively from the case of *Isaac v. Davey*. His purpose is to establish the first step in defining "aboriginal rights." He argues that a thorough understanding of the legal and historical context of "aboriginal rights" is necessary to define these rights under the *Constitution Act, 1982*. Common and statute law, and their interpretation by the courts: have been influenced by historical events, and modern explanations of those events. He concludes that without an understanding of the nexus between law and history, any attempt to define "aboriginal rights" will be most difficult, if not impossible.

L'auteur fait remarquer l'histoire du rapport légal entre la bande des Six Nations autochtones et le gouvernement, en faisant largement attention au procès qui oppose *Isaac* à *Davey*. Son but est d'établir la première considération nécessaire pour la définition des "droits aborigènes". Il affirme qu'une compréhension solide du contexte légal et historique des "droits aborigènes" est nécessaire pour définir ces droits sous l'*Acte de Constitution, 1982*. L'interprétation du droit commun et du droit écrit par les cours a été influencée par les événements historiques, et les explications modernes de ces événements" Il conclut que si *l'on ne* saisit pas bien le *lien* entre le droit et l'histoire, toute tentative de définir les "droits aborigènes" sera très difficile sinon impossible.

The role of the courts in Canadian society is often misunderstood or ignored by Canadians in general and historians in particular. With the notable exception of the recently-founded Osgoode Society and its publications, such as David H. Flaherty's *Essays in the History of Canadian Law* (1981, 1985), there are few articles, texts or monographs in Canadian historiography with respect to the judicial system to rival those in other countries such as the United Kingdom or the United States of America (Harding, 1966) or, within Canada, the histories of the fur trade or of Canadian Federal politics. This neglect of the Canadian legal system may be explained by the perception of non-lawyers that legal language is archaic; that the concepts of law are beyond the comprehension, and manipulation, of ordinary people; or a fear of being tainted by something that is undefined and unknown. This perception is unfortunate. Law is at the root of any and all societies. The expression does differ as between societies, but it does exist for one simple reason - somebody or some thing must resolve disputes with some degree of finality between or amongst individuals or between the state and individuals. In Canada, the courts have held this role for centuries. The heritage of Canadian courts dates back several more centuries in the United Kingdom and France.

The law and the courts live as part of and reflect the society in which they exist. The Anglo-based common law tradition of law, whereby law was created by the judiciary at common, is the most often used example in Canada of this view of law and the courts. In common law, the rules used to resolve disputes between litigants were based on several principles; the rules themselves were adapted to changing circumstances and times, with varying degrees of success. The less than fictitious legal case of *Jarndyce v. Jarndyce* in *Bleak House* in mid-nineteenth century English common law courts and courts of equity was Charles Dickens' example of the inability of those courts to adapt and fulfill their function - to resolve disputes with finality.

The resolution of disputes by the courts has two almost inevitable results: the enrichment of members of the legal profession and the designation of the litigants as "winners" or "losers". But society as a whole, or groups within the society, may also "win" or "lose" as a result of a court decision. The decision of the Judicial Committee of the Privy Council in *Donoghue v. Stevenson*<sup>1</sup> in 1952 opened the courts to hearing cases for liability for negligence where no contractual relationship existed between the parties, an element which was previously required. In that case a woman drank from a bottle of ginger beer bought for her by a friend, only to discover, she alleged, a dead snail flow from the bottle. Not unnaturally, she became concerned about what she had consumed and became ill. She sued for her damages, but apparently died of other causes before the trial could be heard on the merits. Modern Canadian society could not adequately function without the right of an individual to sue in Court for damages as a result of the negligence of another. It is an essential ingredient in the accountability of individuals or corporations to others in the society, and it developed in part from a snarl in a bottle (Linden, 1981:565).

In the post-World War II period several cases were brought by Indians with respect to "aboriginal rights". The cases culminated in *Calder v. Attorney*

*General for British Columbia.*<sup>2</sup> Prior to the Calder case, the existence in law of aboriginal rights held by a particular band of Indians was dependent upon the interpretation of the Royal Proclamation of 1765, for its legal wording, the historical circumstances surrounding it and geographic boundaries. Mr. Justice Hall's decision, though, recognized the common law existence of aboriginal rights independent of the Royal Proclamation of 1765. This recognition was crucial in that the courts have a duty to resolve disputes brought before them, but a right may be enforced only if it has a basis in law. A moral right cannot be enforced by the judicial system.

The Charter of Rights and Freedoms, entrenched in the Constitution of Canada by the *Constitution Act*, 1982, as amended, may have potential to substantially and significantly alter the legal relationship between Native peoples and governments, both at the federal and at the provincial levels. Two provisions of the Charter, sections 5 and 37 are of importance. Section 5 reads as follows:

- 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

Section 37, as amended, provided for a series of four First Ministers' Conferences on the Constitution, to which representatives of Native organizations were invited. These Conferences were intended, in part, to define politically the phrase "existing aboriginal rights" rather than refer the matter to the courts for adjudication. The conferences were not, however, successful in this regard. Any judicial definition of "existing aboriginal rights" will be difficult, if not impossible, without reference to and assistance from the historical and legal professions. History and law provide the context for the judicial, or political, resolution of this issue.

The Six Nations provide a good example of this nexus between history and law as it pertains to the constitution. The Six Nations Indian Band at Indian Reserve 4440, near Brantford in Southern Ontario, has had a long and extensive experience with the courts in present-day Canada. The issues litigated by the Six Nations Indian Band have varied from claims to compensation for flooded reserve land to claims to negligence on the part of officials in the Department of Indian Affairs. The Band has more often than not "lost" those cases. In the case of *Isaac v. Davey*<sup>3</sup> for example, although between two groups of litigants within the Indian Band, an underlying issue was whether or not the right to decide the method of determining Band political leadership and representation was an "aboriginal right". The resolution of this dispute between the "hereditary chiefs" and the elected Band Councillors, which began in 1924, may affect the definition of "existing aboriginal rights" for the purposes of the Charter of Rights. To fully understand the effect, an overview of the history of the Six Nations is necessary.

The Six Nations Indian Band is a confederacy of Indian peoples established in the late sixteenth century. The confederacy originally included the Mohawk, Oneida, Onondaga, Cayuga and Seneca (the Five Nations). The Tuscarora joined the confederacy in the early eighteenth century (Johnston, 1964:xxviii). The Six Nations moved to the Grand River valley and an area adjacent to the Bay of Quinte from their traditional hunting grounds in the United States in 1784. Their traditional hunting grounds were south of Lakes Ontario and Erie comprising an approximate area from the Hudson River in the east to Lake Erie in the northwest and including the northern part of Pennsylvania in the south (Graymont, 1972:xii; Johnson, VI:450; Trigger, 1978). This area was within the larger territory identified in the Royal Proclamation of 1765 as part of the Indian territory and subject to the provision of this Proclamation to protect Indian lands, e.g., Indian lands could only be alienated through the British Crown.

Pursuant to the Royal Proclamation of 1765, Sir William Johnson negotiated the Treaty of Fort Stanwix in 1768 with the Six Nations. The Six Nations considered the Treaty to be another in a "chain" of peace treaties with the British, to confirm that they were allied with the British Government (Johnston, 1964:\$9-40; Graymont, 1972:26-27, 260). However, the Treaty of Fort Stanwix was more than just a peace treaty because it established a line running roughly along the Ohio River and the Allegheny mountains, identified as the "Old Treaty Line". This line was to mark the division of Indian lands which remained under the protection of the Royal Proclamation of 1765 from the American colonies to the south and east of the line. The British viewed the Treaty as a cession of land to the Crown (Johnson, XII:681) and the establishment of an area for the exclusive use and occupation of the Indian people in the remainder of the Six Nations hunting grounds in the American territory which would be consistent with the Royal Proclamation of 1765. Sir William Johnson understood his instructions from the Government in England to be

that Measures should be taken with the consent & Concurrence of the [Six Nations] Indians to Ascertain a fixed boundary for the Lands, to be reserved to them, and where no Settlements whatever Should be allowed, on this I sounded the Indians. who Agreed to it, & they were promised a verry [sic] handsome Return for what they should give up to the Provinces.<sup>4</sup>

To this end, he negotiated at a meeting for that purpose with the Six Nations "a Deed of Cession to his Majesty" in the spring of 1768 (Johnson, XII:656).

The Six Nations, with the exception of the Oneida and some of the Seneca and Mohawk, fought with the British troops against the American forces during the American Revolution, 1776-1785. The Governor of Quebec, Sir Guy Carleton, at the outbreak of the war with the American colonies, according to representatives of the Six Nations, promised to restore to the Six Nations their land. On April 7, 1779, Sir Frederick Haldimand, Commander in Chief of Quebec and His Majesty's Forces, stated:

Some of the Mohawks... whose settlements... had been, upon account of their steady attachment to the Kings Service and the Interests of Government, ruined by the Rebels, having informed me, that my predecessor Sir Guy Carleton was pleased to promise as soon as the Present troubles were at an end, the same should be restored, at the expense of Government, to the state they were in before these broke out, and said promise appearing to me just, I do hereby ratify the same, and assure them, the said promise, as far as in me lies, shall be faithfully executed, as soon as that happy time comes.<sup>5</sup>

The "Preliminary Articles of Peace of Paris", of April 1783, between Great Britain and the United States of America, did not consider the Six Nations and their interest in the land which had been reserved for their use in the United States of America by the Royal Proclamation of 1765 and the Treaty of Fort Stanwix of 1768. Sir Frederick Haldimand had apparently advised the British Government that provision should be made in the Peace Treaty for the Six Nations and their lands in the United States. However, the Treaty of Paris of September 1785, transferred ownership to and jurisdiction over the territory delineated by the Treaty of Fort Stanwix of 1768, to the United States. The Six Nations were angered by the omission from the Treaty of Paris of any provisions which would have protected their interests in the United States. The Six Nations responded that the King

Had [no] right Whatever to grant away to the States of America, their Rights or Properties without a manifest breach of all justice and equity, and they would not submit to it as they were a free People subject to no Power upon Earth.<sup>6</sup>

The Six Nations argument was based upon their understanding of the "chain" of treaties of "peace and alliance" which they had originally entered into with Dutch authorities and, beginning in 1679, with British Authorities. These treaties, according to the Six Nations, culminated with the Treaty of Fort Stanwix of 1768.

The Six Nations who fought with the British were unable to negotiate a satisfactory settlement with the Commissioners of Indian Affairs, appointed by the Congress of the United States.<sup>7</sup> Additionally, the Six Nations lands in the United States of America, which the British Crown was no longer able to protect, were being encroached and settled upon by American settlers.<sup>8</sup> In March 1783, Chief Joseph Brant of the Mohawk, representing the "Mohawks and other Indians", formally petitioned Sir Frederick Haldimand for fulfillment of his promise of April 7, 1779.<sup>9</sup> The grounds for the petition were that the Six Nations were loyal to the British Crown and they had sustained losses during and after the Revolutionary war while furthering the interests of the Crown.<sup>10</sup> Sir Frederick Haldimand, with the advice of Sir John Johnson,<sup>11</sup> agreed with Joseph Brant that the Crown had an obligation to the Six Nations,

but reserved his decision on the implementation of that obligation until he received instructions from the British Government,<sup>12</sup> In August of 1785 the British Government concurred with Haldimand's suggestion that a tract of land be established for the occupation of the Six Nations. Frederick North, Earl of Guilford (Lord North), who served as Prime Minister throughout the American Revolutionary War, (with the exception of the short-lived ministry of William Petty Fitzmaurice, Second Earl of Shelburne), wrote to Sir Frederick Haldimand on August 8, 1783 that

the King... much approves of your having sent Major Holland to . . . survey the North Side of Lake Ontario, your endeavour to prevail upon the Mohawks to settle to the Northward of the Lake, provided the Country should be found well suited for their convenience. These People are justly entitled to Our peculiar attention, and it would be far from either generous or just in Us, after our Cession of their Territories and Hunting Grounds, to Forsake them. I am, therefore, authorized to acquaint you, that the King allows you to make those Offers to them, or to any other Nations of the friendly Indians, who may be desirous of withdrawing themselves from the United States, and occupying any Lands which you may allot to them within the Province of Quebec.

... In the assortment of Presents to be sent out to you for these People you will find a supply of Tools and Implements for Cultivation, which, it is judged will be useful in the formation of new Settlements.<sup>13</sup>

In 1784, the Mississauga Indian people were regarded by the British Government as the aboriginal inhabitants of the territory in which the Grand River tract was located.<sup>14</sup> The Mississauga, after a May 22, 1784 meeting with the Six Nations (Johnston, 1964:46-48), agreed to cede to the British Crown whatever interest they had in their hunting grounds. Lieutenant-Colonel Butler was to be given

the Necessary directions for Purchasing without loss of time, the Tract of Country . . . situate between Lakes Ontario, Erie & Huron.<sup>15</sup>

By an indenture dated May 22, 1784, the Mississauga ceded<sup>16</sup> part of their hunting grounds to the British Crown, including the "waters" and "water-courses" within the area ceded (which was later confirmed as Treaty #3 on December 7, 1792). On October 25, 1784, Sir Frederick Haldimand issued a Proclamation which stated in part that the Six Nations were

to take possession of and settle upon the banks of the river commonly called Ouse or Grand River, running into Lake Erie, allotting

to them for that Purpose six miles deep from each side of the River beginning at Lake Erie, and extending in that Proportion to the Head of the said River (Indian Treaties and Surrenders, 1971:251).

Joseph Brant interpreted the Proclamation to be a grant in fee simple to the tract of land adjacent to the Grant River (Weaver, 1978:525). He was also of the opinion that the Six Nations were the sovereign allies of the Crown, not its subjects.<sup>17</sup> In a letter to William Claus, for example, Joseph Brant commented that

At the close of the late American War, we applied to His Excellency General Haldimand for the Lands on the Grand River, that we might again settle ourselves, and live as we formerly had done, when we had lands that we could call our own property - General Haldimand without Hesitation granted us the same . . . We have understood . . . from some White People here, that it does not appear from this grant, that we are entitled to call these Lands on the Grand River our own. In consequence of this we applied to His Excellency Lieut. Governor Simcoe for a new Grant, he having upon his arrival promised to settle this Matter agreeable to our Wish.<sup>18</sup>

The British Government took a different view of the nature of the interest vested in the Six Nations and the political status of the Six Nations (Weaver, 1978:525). For example, the "Trustees of the Six Nations Indians", Messrs. John H. Dunn, George H. Markland, and William Hepburn, in a report on the Six Nations lands written in the early 1830's, concluded that

the most extensive effect [that is] possible to the Grant of Sir Frederick Haldimand... it confers an equitable title merely upon the Indians in the Grand River Lands, leaving the legal title still vested in the Crown.<sup>19</sup>

The difference of opinion between the Crown and the Six Nations as to their political status and their interest in the Grand River tract, combined with the increasingly troublesome problem of non-Indian people squatting upon Indian lands and the unauthorized alienation of Indian lands, necessitated that the intentions and legal effects of Haldimand's Proclamation be clarified. Additionally, an error in the description of the Mississauga Cession of 1784, apparently detected by Sir John Johnson in the early 1790's, had to be corrected. The error involved the location of the northern boundary of the tract. At the time of issuance of the Haldimand Proclamation it was thought that the River La Tranche (Thames River) met the Grand River near the head of the Grand River and within the territory ceded by the Mississauga in 1784. This, however, does not occur.<sup>20</sup>

On January 4, 1791, Lieutenant Governor Alured Clarke appointed a committee to investigate "the nature and extent" of the Haldimand Proclamations's grant to the Six Nations. The committee was

to report the result of their Enquiries, with their opinion of the proper course to be taken, and the Draft of a Bill, if they shall conceive the Legislative interposition necessary...<sup>21</sup>

The Committee reported on December 24, 1791. It concluded that

as the faith of Government is pledged to the Mohawk Chiefs for the two tracts mentioned above [Grand River and Bay of Quinte] every precaution ought to be taken to preserve them in the quiet possession and property of them and the Committee submit, that an Act of the Provincial Legislature, or a grant under the great seal of the province be made in favour of the principal Chiefs, on behalf of their Nation, or persons in trust for them, for ever.<sup>22</sup>

On December 7, 1792, the Mississauga ceded all their interest in the territory in which the Grand River tract was located by Indenture, (Cession #3), correcting the previous error discovered by Sir John Johnson in the description of the boundary of the territory being ceded (Canada Indian Treaties and Surrenders, 1:5-7).

The Simcoe Patent was issued on January 14, 1795. By this patent, the British Government intended to establish with greater certainty the location of the boundaries of the Grand River tract and to define the nature of the Six Nations interest in it.

The patent stated in part,

. . . that whereas the attachment and fidelity of the Chiefs, Warriors and people of the Six Nations to Us and to our Government has been made manifest on divers occasions by their spirited and zealous exertions and by the bravery of their conduct and We being desirous of showing our approbation of the same and in recompense of the losses they may have sustained of providing a convenient Tract of Land under our protection for a safe and comfortable Retreat for them and their posterity (Canada Indian Treaties and Surrenders, 1:9).

The Six Nations continued to claim to be "allies" of the Crown instead of subjects to the Crown throughout the nineteenth and twentieth centuries, notwithstanding the 1823 case of *The King v. Phelps* in which the Court of King's Bench for Upper Canada ruled that Indians were subjects of the Crown, not its allies. Additionally, it has been settled law since Calvin's Case, of 1608, that the Crown's jurisdiction is coterminal with the boundaries of the country.



There cannot be a sovereign state within a sovereign state. In the 1920's the council of hereditary chiefs attempted to obtain international recognition of the Six Nations purported sovereignty at the League of Nations and in 1945 before representatives of the United Nations. In 1921, legal counsel for a Mrs. Sere, a member of the Six Nations residing on the Tyendinaga Indian Reserve, argued, unsuccessfully, that the Six Nations were "an independent people" and "allies" of the Crown, and not subjects of the Crown.<sup>23</sup> The argument was once again raised in *Logan v. Styres et al.*<sup>24</sup> in 1959 before Mr. Justice King of the Ontario High Court. King, J. concluded that "by accepting the protection of the Crown . . . [the Six Nations] owed allegiance to the Crown and thus became subjects of the Crown".<sup>25</sup>

The history of the Six Nations Indian Band was an important component of the case of *Isaac et al. v. Davey et al.*<sup>26</sup> as it worked its way through the Ontario High Court of Justice, Ontario Court of Appeal and the Supreme Court of Canada. The courts were directed, in part, by the historical documentation and evidence in their resolution of the issues brought before them by the litigants. The issues included whether or not the Six Nations Indian Band was a sovereign nation on the basis that they were "allies" of, not subjects of, the Crown; the validity of the *Indian Acts* of 1924 and 1951, as amended, as applied to the Six Nations Indian Band; the aboriginal interest, if any, of the Six Nations Indian Band in the Six Nations Indian Reserve #40; the legal interest, if any, in land granted to the Six Nations Indian Band by the Haldimand Proclamation and the Simcoe Patent; and, underlying these issues, the legal ability of the Six Nations Indian Band to determine the method for choosing political leaders and representatives.

Isaac and the other plaintiffs were members of the elected Band Council. The Band Council was elected pursuant to P.C. 6015 (formerly P.C. 1629) under the *Indian Act* as amended to 1951 (formerly the *Indian Act* as amended to 1924). The defendants, members of the "Council of Hereditary Chiefs", were chosen by the "clan mothers" according to traditional methods. Only the Band Council was recognized by the Department of Indian Affairs as having legal authority after 1924 to function as a "council" for the purposes of the *Indian Act*.

The adherents to the traditional method of choosing Band political leaders refused to accept the validity of the elected Band Council. In June and July of 1970 the defendants, or some of them, caused the doors of the Council House to be padlocked thereby prohibiting the elected Band Council access to the Council House. An interim injunction was sought by and granted to the plaintiffs. The trial was heard by Mr. Justice Osier, of the Ontario High Court of Justice in early summer of 1973.<sup>27</sup>

Osier, J. noted in his decision that "the Council House . . . was built in 1886 when the Hereditary Chiefs represented the only form of government on the Six Nations lands".<sup>28</sup> These two historical facts appear to be important to His Lordship. He concluded that the Six Nations Indian Band was not a sovereign nation, based on the earlier cases of *Sere v. Gault* and *Logan v. Attorney General for Canada*.<sup>29</sup> He decided that

the "Simcoe grant" of 1793 was effective to pass title to all members of the Six Nations Band in fee simple. Difficult questions concerning joint tenancy and tenancy in common no doubt arise in the minds of conveyancers. However, the Crown, as represented by Lord Haldimand in 1784, was content to accept a grant from "the Sachems, war chiefs and principal women of the Mississauga Indian Nation", as a granting party and to refer to that grant as a purchase. The same tract of land or a portion thereof, was dealt with by Haldimand in his proclamation of 1784, the true nature of which was probably closer to a licence than any other known form of conveyance, and by Lord Simcoe in 1793 in the form of an outright grant "to the chiefs, warriors, women and people of the said Six Nations and their heirs forever".<sup>30</sup>

Osler, J. continued, related to the underlying issue, that

Subsequent events, including the passing of the *Indian Act* and of P.C. 6015, have not, in my view, affected the quality of that grant or the title held under it. Regardless of the problems faced by conveyancers by some thousands of persons, for practical purposes the question must be determined whether in dealing with lands so held, as the Council House undoubtedly is, the leaders selected by the old system or those "elected" under the provisions of the *Indian Act* are to be recognized.<sup>31</sup>

Osler, J. was concerned with the legitimacy of the elected Band Council and the imposition of the elected system of government under the *Indian Act* upon the Six Nations Indian Band. On a technical definition of "Band", Osler, J. decided that the Six Nations were not an Indian "Band" for the purposes of the *Indian Act*. The basis for his decision on this issue was that because the "Simcoe grant" provided the Six Nations with a *fee simple* interest in land, that land was not held by the Crown (Canada) for the benefit of an Indian Band and therefore, under the *Indian Act*, the Six Nations were not a Band.<sup>32</sup> If they were not a Band, the provisions of the *Indian Act* did not and could not apply to the Six Nations. His Lordship continued:

It follows that the plaintiffs... have no authority under the *Indian Act* to occupy or control the Council House to the exclusion of any others. Even assuming the validity of P.C. 6015, it is pointed out that S.81(h) of the current Act which gives a band council under the Act the power to make by-laws for "the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band", has not been followed and no effort has been made by the plaintiffs to control the use of the building through the only method by which the Act purports to give them power to do so...

It is claimed by the plaintiffs that even if they have no statutory rights they do represent all other members of the Six Nations Band except the defendants. Some showing of the right to such a claim must be made if it is to be sustainable. In the present instance not only is there no showing of such right, but such evidence as there is indicates conclusively not only that the system imposed by the *Indian Act* is not supported by more than a small fraction of the population of the lands in question but that certain of the plaintiffs were elected by a very small fraction of those eligible... Their representative character is therefore seriously in doubt. In my view, the defendants as representing the Council of Hereditary Chiefs have by far the better claim to the management of the premises in question.<sup>33</sup>

The importance of Osler, J's reasons for judgement is that it provides a basis from which the "Council of the Hereditary Chiefs" could argue that the traditional method by which Indian Band political leaders and representatives are chosen will be recognized in law as an "aboriginal right". The effect of the resolution of the dispute between Isaac and Davey would, therefore, have a more broad reaching effect than is at first readily apparent.

The decision of Mr. Justice Osler was appealed to the Ontario Court of Appeal.<sup>34</sup> Appeals are not heard on all the matters in a case, rather on questions of law, as opposed to questions of fact. The issue on appeal was whether or not Osler, J. was correct in law in deciding that the Six Nations were not a "Band" within the meaning and for the purposes of the *Indian Act*. Between the date of Mr. Justice Osler's decision and the hearing of the appeal, the Supreme Court of Canada ruled that the *Indian Act* was not inoperative by reason of the Canadian Bill of Rights. Mr. Justice Arnup, who wrote the reasons for judgement in an unanimous decision of the Court of Appeal, examined the Simcoe Patent and concluded that it was not a grant of land in fee simple, and therefore the land was held by the Crown for the benefit of the Six Nations Indian Band. Arnup, J.A., wrote:

In my opinion the intention of the Haldimand Proclamation and of the Simcoe Deed was the same. It was to confer upon the loyal subjects of the Crown within the Six Nations Confederacy who had come to Upper Canada the same rights as were enjoyed by those Indians who had always been there. Both documents were in accord with and implemented the policy enunciated in the Proclamation of 1763.<sup>35</sup>

He noted that this

finding further destroys the basis upon which Osler, J., found that the two Orders in Council were invalid.... In summary, Part II of the Act could be made applicable to a "band of In-

dians".<sup>36</sup>

Arnup, J.A., continued that

Since I have concluded that the tract in question is still vested in the Crown, *subject to the exercise of traditional Indian rights*, the land at both relevant dates was within the definition of "reserve" and the Six Nations were within the definition of "band" (emphasis added).<sup>37</sup>

Although Arnup, J.A., did not directly address the underlying issue of whether or not the method of choosing political leadership and representatives is, in his words, a "traditional Indian right", he did touch the issue. He noted that "the majority of the Six Nations living on the reserve have refused to recognize the application of the Indian Act to them and to the reserve",<sup>38</sup> a fact that Osler, J., considered significant.

Given that he did not address the issue or argument directly or overrule Mr. Justice Osler on that point, Arnup, J.A.'s, language is open to the suggestion that the method of choosing political leadership or representation is a "traditional Indian right", and one that continued in Canada after 1793. It may or may not have been "extinguished" by P.C. 1629 or P.C. 6015, under the *Indian Act*, 1924 and *Indian Act*, 1951 respectively, but that is not determinative of its existence in a conceptual context. It is not an unreasonable conclusion from Mr. Justice Osler's reasons for judgement at the trial level and Mr. Justice Arnup's reasons for judgement on appeal that the right to decide the method by which political leadership and representation is chosen is an aboriginal or "traditional Indian right" that may be eventually recognized by the courts and enforceable in law.

The decision of the Court of Appeal was appealed by the "hereditary chiefs" to the Supreme Court of Canada.<sup>39</sup> At the hearing several other parties, including the Union of Ontario Indians and the Temagami Indian Band, were heard by the Court as intervenants.<sup>40</sup> Several volumes of material were filed with the Court on the issue of aboriginal rights. The case was viewed as being an important one by various Indian Bands and organizations in Ontario. It was one of the first cases following the *Calder* case that provided an opportunity for the Supreme Court of Canada to develop the concept of aboriginal rights and its incidents in a legal context.

The Court did not make use of this opportunity. Its decision was based upon the narrow issue of whether or not the Six Nations were a "Band" within the meaning and the purposes of the *Indian Act* and therefore subject to its provision concerning an elected Band Council. Mr. Justice Martland for the Court wrote

without wishing to cast any doubt on the conclusion reached by the Court of Appeal I do not think it is necessary in the present case to make a final decision on the matter of title to the lands because, in my opinion, the validity of P.C. 6015 can be founded on sub para. (ii) of S.2(1) (a) [of the *Indian Act*] which provides that a "band" means a body of Indians "for whose use and benefit in common,

moneys are held by His Majesty".<sup>41</sup>

On this basis the Supreme Court of Canada ruled that

as the elected Council of the Six Nations Band, the respondents were properly entitled to use the Council House, the property of the band for Council purposes.... In any event the appellants were not lawfully entitled to prevent the use of the Council House by the elected Council.<sup>42</sup>

Martland, J.A.'s, words, it is suggested, are not conclusive with respect to the issue of the authority of the elected Band Council. A not unreasonable interpretation of those words may be that the hereditary chiefs have some degree of authority as political leaders of the Six Nations Indian Band. Neither the Court of Appeal nor the Supreme Court of Canada dealt directly with Osler's contention that the "representative character" of the elected band council was "seriously in doubt".

Mr. Justice Arnup noted at the beginning of his reasons for judgement that this

action requires the resolution of a dispute between two groups of Indians of the Six Nations residing on the Six Nations Reserve near Brantford.... This bold and over-simplified statement of the issues must be broken down into a whole series of interwoven issues that must be separately examined after the long history has been stated, since they cannot otherwise be formulated or understood.<sup>43</sup>

The courts have not resolved with finality the issue of whether or not the members of the Six Nations Indian Band can determine the method by which they choose political leadership and representation as an aboriginal right. The incidents of aboriginal or "traditional Indian rights" is still open to question and, presumably, further litigation. However, Mr. Justice Osler's reasons for judgement and the Court of Appeal's and Supreme Court of Canada's lack of decision on the point, indicates a willingness on the part of the courts in Canada to examine aboriginal rights as a concept and to translate that concept into a legal and enforceable right. In this context, though the "hereditary chiefs" may be identified as the "losers" in *Isaac et al. v. Davey et al.* and the elected Band Council as the "winners", Indian peoples as a whole may have "won", in the legal recognition by the courts of aboriginal rights and their attempts to recognize and understand the complexity of the issues and circumstances surrounding the concept of Aboriginal rights.

The legal relationship between Indian peoples and governments is undergoing a major reform rivalling the changes arising from the Indian Act of 1876. That legislation provided the government with the legal basis for the "exclusive control over... the population, land and finances" of Indian Bands in Canada

(Milloy, 1983:57). Don McCaskill, in a recent article entitled "Native People and the Justice System" wrote that "the area of native people and the justice system, and the law generally, has been a neglected area of scholarly enquiry in Canada" (1983:288). The law, in its varied manifestations, defines those relationships that are enforceable and have been enforced by the courts. The historical record of those relationships, including the case law and materials filed with the courts, provide a vast underutilized primary source for historians. Until this source has been adequately developed, a complete understanding of the Indian and government relationship is not possible. Without that understanding any attempt to define "existing aboriginal rights" will be most difficult.

#### NOTES

The views expressed in this paper are those of the author only, and do not necessarily reflect the opinions of any other individual or organization.

1. [1932] A.C. 562.
2. [1973] S.C.R. 313.
3. (1973) 38 D.L.R. (3d) 23, (Ont. H.C.J.) over-ruled (1974) 51 D.L.R. (3d) 170, (Ont. C.A.) affd (1977) 77 D.L.R. (3d) 481 (S.C.C.).
4. Sir William Johnson to Thomas Gage, March 5, 1768, *William Johnson Papers*, Volume XII, p. 459. See also Graymont, p. 27; Haldimand to Colonel Campbell, July 20, 1779, Public Archives of Canada, Haldimand Papers, A-683 in which Haldimand advises Colonel Campbell that:

It would not be amiss to represent to them that *as good subjects and Dutyfull Children*, they ought, when bad people come amongst them rather to advise you of it, and deliver them up, than to harbour and conceal them [Emphasis added].

5. Sir Frederick Haldimand, Quebec, April 7, 1779, P.A.C., Haldimand Papers, A-683; See also, Proceedings of a Meeting of Sir John Johnson and the Six Nations, Niagara, March 20, 1780, P.A.C., Haldimand Papers, A-686.
6. Allan Maclean to Sir Frederick Haldimand, May 18, 1783, P.A.C., Haldimand Papers, A-685; Ibid. Sir Frederick Haldimand to Sir John Johnson, May 22, 1783; Ibid. A-686, Haldimand to Six Nations, March 24, 1784; See also Graymont, *The Iroquois in the American Revolution*, p. 260.
7. Proceedings of Six Nations Council at the Onondaga Settlement, July 2, 1783, P.A.C., Haldimand Papers, A-683; Ibid., A-686, Schuyler to Six

- Nations, January 1784. See also Charles M. Johnston, *The Valley of the Six Nations*, p. XXXIV, Barbara Graymont, *The Iroquois in the American Revolution*, pp. 264-295.
8. Allan MacLean to Sir Frederick Haldimand, May 18, 1783, P.A.C., Haldimand Papers, A-684; *Ibid.*, A-685, Matthews to J. Johnson, May 29, 1783. See also Lord Dorchester to the Confederacy of Six Nations, March 10, 1791, Ontario Archives, Simcoe Papers, Letterbook Vol. 17, p. 35.
  9. Brant to J. Johnson, May 4, 1784, P.A.C., Haldimand Papers, A-685; *Ibid.*, Haldimand to J. Johnson, May 26, 1783.
  10. "Substance of Brant's Wishes Respecting Forming a Settlement on the Grand River" and Haldimand's Answer, March 1783, P.A.C., Haldimand Papers, A-685. See also RG1, A-I-1, Vol. 2, p. 147.
  11. J. Johnson to Haldimand, August 11, 1785, P.A.C. Haldimand Papers, A-685.
  12. Haldimand to J. Johnson, May 26, 1783, P.A.C., Haldimand Papers, A-685. See also *Ibid.* Haldimand to J. Johnson, May 22, 1785.
  15. Lord North to Haldimand, August 8, 1783 as quoted in Charles M. Johnston *The Valley of the Six Nations*, p. 42.
  14. Charles M. Johnston, "An Outline of Early Settlement in the Grand River Valley", in J.K. Johnson (Editor): *Historical Essays on Upper Canada*, (Toronto: McClelland and Stewart Limited, 1975) p. 6; Substance of Captains Brant's wishes respecting forming a settlement of the Mohawk and others of the Six Nations Indians upon the Grand River, O.A., RG1, A-I-1 Vol. 2, p. 147, in which the Mississauga are referred to as "proprietors".
  15. Extract of a letter from General Haldimand to J. Johnson re proposed settlement of the Mohawks on the Grand River, March 23, 1784, O.A., RG1, A-I-1, Volume 2, p. 106. See also O.A., *The Report of the Bureau of Archives*, 1905, Vol. 3, p. 489.
  16. Copy of Deed from the Mississaugas, May 2nd, 1784, O.A., RG1, A-I-1, Volume 2, p. 145.
  17. See for example John Norton to Lord Colborne, December 1815, P.A.C., RG7, GI4, Vol. i; John Norton and Joseph Brant to Lt. Gov. F. Gore, September 4, 1809 and two undated drafts of letters written by John Norton, O.A., John Norton Papers. See also Charles M. Johnston, *The Valley of the Six Nations*, pp. xlv-xlv.

18. Brant's Address to William Claus on the Subject of the Indian Lands, November 24, 1796, as quoted in Charles M. Johnston, *The Valley of the Six Nations*, pp. 81-84.
19. Grand River Claims, Report of the Trustees of the Six Nations Indians, O.A., J.M. Snyder Papers, 1795-1859. Undated report, but probably written in the early 1830's. Also located in P.A.C., RG10, Vol. 105, pp. 41-45. See also Sally M. Weaver, "Six Nations of the Grand River, Ontario", p. 525.
20. O.A., Simcoe Papers, Envelope 1. Marginal notation to "Bounds of a Tract of Land Purchased from the Mississauga Indians 2nd day of May 1784 by order of General Haldimand dated 23rd March, 1784":

Sir John Johnson apprehends a mistake was made in mentioning a NorthWest course which he thinks would not strike the River La Tranche (Thames River) and believe it should have been *South West*.

See also Letter from John Johnson re Indian settlement on the Grand River, February 3, 1791, O.A., RG1, A-I-1, Vol. 2, p. 21 ("it is uncertain whether the course described in the Deed, commencing at a certain point at the entrance of the little lake at the head of Lake Ontario, will intersect the Grand or Oswego River so high up as the River La Tranche"); and John Johnson to J. Collins re purchase of Indian lands on the Grand River and Bay of Quinte, March 25, 1791, O.A., RG1, A-I-1, Vol. 2, p. 104.

21. C.A., RCI, A-I-1, Vol. 1, pp. 141-142.
22. O.A. *The Report of the Bureau of Archives*, pp. 495-494.
23. (1921) 50 O.L.R. 27.
24. (1059) 20 D.L.R. (2d),416.
25. *Ibid.*, p. 422. See also Malcolm Montgomery, "The Legal Status of the Six Nations Indians in Canada", *Ontario History*. Vol. 55, (1965), No. 2, pp. 93-105 for a good discussion of the history of the Six Nations Indian Band and *Logan v. Styres et al.*
26. See note \$ above.
27. See Peter Maxwell Jacobsen, "Who Rules the Valley of the Six Nations? (A discussion of *Isaac v. Davey*)", (1976) 22 *McGill L.J.* 150-147 for a good discussion of *Isaac et al. v. Davey et al.* at the trial and appellate levels of the legal issues.



28. (1973) 38 D.L.R. (3d) 23 at p. 26 and p. 33.
29. *Ibid.*, at pp. 28, 31.
30. *Ibid.*, at p. 30.
31. *Ibid.*
32. *Ibid.*, at pp. 31-33.
33. *Ibid.*, at pp. 33-34.
34. (1974) 51 D.L.R. (3d) 170.
35. *Ibid.*, at p. 181.
36. *Ibid.*, at p. 182.
37. *Ibid.*, at pp. 182-183.
38. *Ibid.*, at p. 175.
39. (1977) 77 D.L.R. (3d) 481.
40. Copies of the *Factums* and *Submissions* filed with the Supreme Court of Canada are in the possession of the author.
41. (1977) 77 D.L.R. (3d) 481 at p. 484.
42. *Ibid.*, at p. 486.
43. (1974) 51 D.L.R. (3d) 170 at p. 172.

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